



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated November 19, 1999, the Board reversed December 3 and August 14, 1997 decisions, denying appellant's occupational disease claim.<sup>3</sup> It found that he had established that he sustained staphylococcus aureus and dermatitis herpetiformis due to exposure to coliform-positive waste water in the course of his federal employment. By decision dated August 27, 2002, the Board affirmed an OWCP decision reducing appellant's compensation to zero effective August 5, 2001 as he failed to cooperate with vocational rehabilitation.<sup>4</sup> The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

OWCP subsequently expanded acceptance of appellant's claim to include streptococcal septicemia, contact dermatitis, sebaceous cyst, actinic keratosis and a post-traumatic wound infection.

On February 16, 2011 appellant, through his senator, requested reconsideration. He related that he sustained ischemic heart disease due to his post-traumatic wound infection and that OWCP's failure to approve prompt treatment worsened his condition. Appellant maintained that he had shown "good faith effort" under section 8113(b) and disability under FECA. He related that a June 7, 1996 decision by the Merit Systems Protection Board (MSPB) "offered reinstatement/reemployment after medical and vocational rehabilitation" but that OWCP did not assist him with "the means to aid the accomplishment of this settlement offering." Appellant indicated that he began vocational rehabilitation services with the State of Florida in 1996.

On February 16, 2011 appellant requested medical benefits for his ischemic heart disease.

In a report dated March 7, 2012, Dr. Rogena Johnson, Board-certified in family medicine, related, "[Appellant] has a history of staphylococcal skin infection causing septicemia and chronic recurring abscess formation that he developed as a direct result of exposure to this bacteria while on the job many years ago. As a result of the septicemia he developed heart valve damage, severe, leading to congestive heart failure...."<sup>5</sup> She discussed his emergency heart valve replacement and attributed the damage to his heart valve to the original bacteria, methicillin-resistant staphylococcus aureus (MRSA).

On May 1, 2012 appellant requested reconsideration. He maintained that he had complied with vocational rehabilitation in 2002, as confirmed by Alice Burrows, a rehabilitation counselor addressing his participation in a program at a state university. Appellant noted that he

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<sup>3</sup> Docket No. 98-1039 (issued November 19, 1999). On June 5, 1996 appellant, then a 42-year-old former hydrological technician, filed an occupational disease claim alleging that he sustained staphylococcus aureus and dermatitis herpetiformis due to factors of his federal employment.

<sup>4</sup> Docket No. 02-976 (issued August 27, 2002).

<sup>5</sup> In a report dated January 10, 2012, Dr. Johnson related that appellant had undergone "an aortic valve replacement and tricuspid valve repair, which were severely damaged due to repeated septicemia and endocarditis, for work[-]related exposure in [the] past and in urgent need of correction when he was hospitalized with sepsis and pneumonia."

had attended college through a program with the state of Florida from 1997 to 2005 but that OWCP did not “respond favorably” to the state’s intervention. Hecited OWCP’s procedures providing that a claimant who subsequently complies with vocational rehabilitation should have his compensation reinstated. Appellant argued that on June 7, 1996 the MSPB instructed the employing establishment to comply with reinstatement decision but OWCP did not assist him in this effort. He further maintained that OWCP did not consider his post-traumatic stress disorder as diagnosed in October 2004 by Dr. James D.D. Bradley, a clinical psychologist. Appellant further asserted that OWCP should address “recommendations for medical rehabilitation” made by Dr. Bharat K. Upadhyay, a Board-certified internist, and Dr. Johnson.<sup>6</sup>

Appellant resubmitted a letter dated February 6, 2002 from a vocational rehabilitation counselor. The counselor informed the Florida Department of Education that he was a student at a state university and had “demonstrated good effort in participating in the rehabilitation program (1997-present).”

In another letter dated May 1, 2012, appellant related that he was enclosing his claim for compensation and request for medical services and rehabilitation. On May 7, 2012 he requested rehabilitation following his heart valve replacement.

In a report dated January 12, 2010, Dr. Upadhyay and Dr. Johnson related that they were treating appellant for “inflammatory, chronic and debilitating cutaneous outbreaks of streptococcal dermatitis.”<sup>7</sup> They found that he was disabled from employment. On May 1, 2012 Dr. Upadhyay diagnosed chronic post-traumatic wound infection, an aortocoronary bypass, a heart value replacement and mitral valve disorder. In an accompanying state workers’ compensation form, he indicated that appellant’s condition was work related and that he “has been disabled.”

By decision dated May 17, 2012, OWCP denied appellant’s request for reconsideration as it was untimely filed and insufficient to establish clear evidence of error.

On appeal, appellant argues that he made a good faith effort to receive medical and vocational rehabilitation, that his physical and emotional condition interrupted his rehabilitation and reemployment, that he should still be in federal service and that he is qualified for a “loan or grant discharge due to OWCP false certification or revocation of intent without proper notice.” He discussed actions by the employing establishment taken in connection with his work injury. Appellant related that OWCP did not comply with FECA and repeatedly denied his “request for medical and vocational rehabilitation.” OWCP did not accept hepatitis B or folliculitis as instructed by the Board or that he sustained PTSD due to his work injury as found by Dr. Bradley. Appellant asserted that he had to seek rehabilitation through the state because OWCP denied his claim prior to the Board’s reversal. He participated in the early stages

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<sup>6</sup> In an October 14, 2003 psychological evaluation, Dr. Bradley evaluated appellant in connection with a state rehabilitation program. He diagnosed recurrent mild major depressive disorder and an anxiety disorder not otherwise specified.

<sup>7</sup> In a report dated April 19, 2010, Dr. Johnson discussed her treatment of appellant for MRSA with recurrent skin colonization. She opined that “his current cardiac condition is the direct result of his occupational exposure which led to bacteremia and valve damage.”

of vocational testing in November 1996. Appellant lost his employment in February 1996 and again received vocational rehabilitation through the State of Florida. He argued that OWCP erred in referring him to a private rehabilitation counselor for retaliation services since he was undergoing rehabilitation through the State of Florida. Appellant noted that an MSPB judge found that he was entitled to compensation.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>8</sup> As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup>

The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.<sup>10</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.<sup>11</sup>

### **ANALYSIS**

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> As appellant’s February 16, 2011 and May 1, 2012 requests for reconsideration were submitted more than one year after the last merit decision of record, issued August 27, 2002, they were untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>14</sup>

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<sup>8</sup>*Supra* note 2.

<sup>9</sup>20 C.F.R. § 10.607.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

<sup>11</sup>*Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>12</sup>20 C.F.R. § 10.607(a).

<sup>13</sup>*Robert F. Stone*, *supra* note 11.

<sup>14</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

Appellant argued that he complied with a state rehabilitation program. He submitted a 2002 letter from a rehabilitation counselor regarding his participation in a state program. Appellant maintained that this showed that he had complied with vocational rehabilitation. The Board, however, previously determined that attending college under a state rehabilitation program did not constitute good cause for failing to cooperate with OWCP's rehabilitation efforts. Absent further review of this issue by OWCP pursuant to section 8128, it is *res judicata*.<sup>15</sup>

Appellant additionally argued that the MSPB instructed the employing establishment to reinstate him but OWCP did not assist him obtaining reemployment. It is well established, however, that decisions made by other federal agencies or government bodies are not dispositive of issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing disability and eligibility for benefits.<sup>16</sup>

Appellant cited OWCP's procedures providing that a claimant who subsequently cooperated with vocational rehabilitation is entitled to have his compensation reinstated. He did not, however, point to any specific correspondence that he sent agreeing to participate in vocational rehabilitation through OWCP or directly inform OWCP that he was now willing to participate in an OWCP-sponsored program.

Appellant argued that OWCP failed to consider that he had post-traumatic stress disorder as diagnosed in 2004. He did not, however, submit any evidence establishing that he was unable to participate in vocational rehabilitation in 2001 due to PTSD. Consequently, appellant's argument does not show clear evidence of error by OWCP.

Appellant raised numerous arguments regarding expansion of his claim and approving medical rehabilitation services. He further generally asserted that he was currently disabled. Appellant submitted medical evidence from Dr. Johnson and Dr. Upadhyay in support of his contentions that his claim should be expanded and that he is disabled. The Board's jurisdiction, however, is limited to reviewing final decisions of OWCP.<sup>17</sup> OWCP has not issued a final decision on the issue of claim expansion or disability. Thus, these issues are not before the Board at this time.

On appeal, appellant asserts that he tried to obtain vocational rehabilitation but his physical condition interrupted the rehabilitation process. He further explains that he initially sought vocational rehabilitation through a state program because OWCP denied his claim. Appellant indicates that he participated in vocational testing in 1996. As discussed, however, the underlying issue is whether he complied with the early and necessary stages of vocational rehabilitation as instructed by OWCP. The Board previously found that appellant's participation in a state program was not a good reason for failing to cooperate with OWCP's rehabilitation

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<sup>15</sup>See *Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>16</sup>See *Andrew Fullman*, 57 ECAB 574 (2006); *Dianna L. Smith*, 56 ECAB 524 (2005).

<sup>17</sup>20 C.F.R. § 501.2(c).

efforts. As discussed, absent further review of this issue by OWCP pursuant to section 8128, it is *res judicata*.<sup>18</sup>

Appellant maintains that OWCP denied his repeated requests for further medical and vocational rehabilitation. He further argues that he is entitled to additional compensation such as a grant or loan repayment. As discussed, OWCP has not issued a decision on these issues. Appellant can clearly inform OWCP if he wishes to pursue vocational rehabilitation or request either expansion of his claim or compensation for disability.

Appellant further argues that OWCP should have accepted hepatitis B and folliculitis based on the Board's decision. However, the Board, in its November 19, 1999 decision, did not determine that he established hepatitis B or folliculitis but rather found staphylococcus aureus and dermatitis herpetiformia casually related to factors of his federal employment.

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision, he has not established clear evidence of error.<sup>19</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

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<sup>18</sup>See *supra* note 12.

<sup>19</sup>See *Veletta C. Coleman*, 48 ECAB 367 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board